No. 14999

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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FRANK ROSS,

*Appellant,*

*vs.*

TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation,

*Appellee.*

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## APPELLEE'S BRIEF.

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### Jurisdictional Statement.

As indicated in Appellant's Brief (App. Br. 2, 3), the jurisdictional basis for his action in the United States District Court is the alleged diversity of citizenship of the parties (28 U. S. C. 1332(a)(1)). It ought to be noted, however, that this jurisdictional basis is challenged in the Answer to Complaint [Tr. 49-57] which appellee, as defendant, filed at the time it filed its motion for a stay of proceedings. The Third Affirmative Defense pleaded in the Answer [Tr. 54] alleges that there has been a non-joinder as plaintiffs of several assignees of fractional interests in the assets of the Corporation to which appellee had agreed to pay stated percentages of

the net profits realized from distribution of the photoplay "The Robe", and that if those persons had been joined the jurisdictional requisite of diversity of citizenship would not exist.

Appellant asserts that this court's appellate jurisdiction to review the ruling of the trial court is conferred by section 1292(1), Title 28, U. S. Code, on the theory that a stay order is in effect an interlocutory order granting an injunction (App. Br. 2).

For many years there was divergence among the rulings of various Circuit Courts of Appeal as to the appealability of stay orders. The tests of appealability applied by the United States Supreme Court in its review of a series of Circuit Court decisions in recent years has evolved a rule of appealability based principally on the old distinctions between actions at law and proceedings in equity, which distinctions, ironically enough, were believed to have been eliminated upon the adoption of the Federal Rules of Civil Procedure (see F. R. C. P., Rules 1 and 2).

The present rule, as gleaned from the case of *Baltimore Contractors, Inc. v. Bodinger,* 348 U. S. 176, 75 S. Ct. 249; 99 L. Ed. 233 (1955), appears to be that an appeal will lie where a stay-order has been made in a "law" type action, but will not lie where such an order has been made in an "equity" type case. Therefore, appealability of the instant ruling hinges on this court's classification of appellant's pending action as one at law or in equity.

In form, the complaint purports to plead a cause of action at law for money, but when analyzed in the light of the equitable issues it tenders, the court may well conclude that this is an equitable proceeding whose ultimate determination must abide the results of an accounting, if not by arbitrators, then in the trial court. (See *Coward v. Clanton,* 122 Cal. 451 (1898); *Hapgood v. Berry,* 157 Fed. 807 (C. C. A. 8, 1907).) In determining whether a proceeding is legal or equitable, it has been authoritatively stated that "the courts are not bound by the pleadings or the form of the action." (31 Am. Jur. 570, Jury §21.) For example, in determining whether the right to a jury trial exists,

> "The right must be determined by the real, meritorious controversy between the parties as shown by the whole case . . . In determining the essential character of the suit or remedy within this rule, the entire pleadings and all the issues raised are to be examined, and not merely the plaintiff's declaration, complaint or petition, or his evidence." (31 Am. Jur. 570.)

Independently of the foregoing challenges to jurisdiction, it appears that in keeping with earlier rulings by this court, the purported appeal in this matter is a nullity and must be dismissed. Attention is directed to the form of the purported order or judgment from which appellant has appealed. The Notice of Appeal [Tr. 67] is "from the order entered November 29, 1955, staying the above-entitled cause." But the only entry made on that date, as appears from the Transcript of Record, was in the

form of "Minutes of The Court" [Tr. 66] which recite "Proceedings: Rulings on Submitted Matter. The court has this day granted the Defendant's Motion to Stay Proceedings, heretofore heard on Nov. 28, 1955. Counsel notified." In *Wright v. Gibson,* 128 F. 2d 865 (C. A. 9, 1942) this court ruled that a minute entry very similar textually to the instant one did not constitute the entry of an order, judgment or decree from which an appeal might be taken. We submit that if the rule of the *Wright* case is adhered to, the instant appeal must be dismissed. The decisions of this court, both before and since the *Wright* case, are all to the same effect. See *City etc. San Francisco v. McLaughlin,* 9 F. 2d 390 (C. A. 9, 1925); *U. S. v. State of Arizona,* 206 F. 2d 159 (C. A. 9, 1953), and cases cited at page 160, footnote 1. Accordingly, the appeal is dismissible on the court's own motion. (*City etc. San Francisco v. McLaughlin, supra;* 13 Cyc. Fed. Proc. (3ed.) §63.111 and cases cited there.)

## Issues Presented.

The controlling issue is whether the stay granted by the trial court was authorized. Appellant (plaintiff below) in his brief argues that the stay was unauthorized, that the controversy disclosed by the complaint is not a controversy within the scope of the arbitration provisions of the contract, and that appellee (defendant below) is in default in proceeding with arbitration.

Appellee contends that the trial court was justified in granting appellee's Motion for Stay of Proceedings pend-

ing arbitration, because the document under consideration [Tr. 17-43, Ex. A] is a "contract evidencing a transaction involving commerce" as that phrase is used in Section 2, Title 9, U. S. Code. Alternatively, appellee argues that it had a right to a stay under state law (Cal. Code Civ. Proc., §1280, *et seq.*) if it should be held that the instant contract did not involve interstate commerce. See *Bernhardt v. Polygraphic Company of America, Inc.*, 350 U. S. 198, 76 S. Ct 273; 100 L. Ed. Adv., p. 203) (1956).

## Summary of Argument.

The argument of appellee may be summarized as follows:

1. The contract of the parties evidences transactions involving interstate commerce.

2. The contract is an enforceable arbitration agreement under California law which accords appellee a right to a stay of judicial proceedings pending arbitration.

3. The contract provides for arbitration of the issues described in the complaint filed by appellant.

4. Appellee is not in default in proceeding with arbitration.

## ARGUMENT.

### I.

### The Contract of the Parties Evidences Transactions Involving Interstate Commerce.

The Federal Arbitration Act (U. S. Code, Title 9, §§1, *et seq.*) recognizes the validity and enforceability of a provision for arbitration, if it is contained in a contract evidencing a maritime transaction or a transaction involving interstate commerce. Appellee makes no claim that the instant contract involved a maritime transaction. On the other hand, and in opposition to appellant's claim that the contract is a simple agreement of sale, appellee contends that a fair reading of the contract shows its intendment to be the production of a photoplay, followed by distribution of that photoplay throughout the world, and that, therefore, it is a contract which evidences transactions involving interstate commerce within the scope of the Federal Arbitration Act.

The rule applicable to the interpretation of contractual documents generally must be observed in construing the intention of the parties here, namely, by reading the written instrument itself and giving a reasonable construction to the terms used. (See Cal. Civ. Code, §§1638-1644; Cal. Code Civ. Proc., §§1856-1861.)

The document is captioned "Agreement of Sale", but its provisions make it clear that it contemplates and provides for more than a sale of chattels. Appellant transferred the rights to a novel, "The Robe", certain manuscripts, compositions, screenplays, copyrights, and other assets. Noteworthy is the provision in the agreement that appellee, designated therein as "Purchaser", ". . . *agrees to produce and distribute a motion picture photoplay to be*

*based upon or adapted from said novel entitled 'The Robe'."* [Tr. 25, Ex. A, Art. X.] (Emphasis supplied.) The contract specifies the manner in which the proceeds from distribution of the picture are to be shared between appellant and appellee. Repeated use of the phrase "throughout the world" [Tr. 18, Ex. A, Art. I; Tr. 19, Ex. A, Art. II; Tr. 21, Ex. A, Art. III; Tr. 22, Ex. A, Art. V]; and the use of such expressions and phrases as "copyright in any country in the world" [Tr. 24, Ex. A, Art. IX] indicate that it contemplates distribution of the contemplated photoplay throughout the world. For example, the contract provides [Tr. 31, Ex. A, Art. XIX (b)] that Purchaser's distribution fees for "distribution in the United States and Alaska" shall be 25% and for "distribution in Canada and all other foreign territories" shall be 30% of "net profits" realized from "the gross receipts of the Picture throughout the world" [Tr. 31, Ex. A., Art. XIX(a)]; then follow detailed provisions for handling foreign revenues accruing "from the distribution or sale or other disposition of distribution or exhibition rights in the Picture in any place foreign to the United States, under contracts made in terms of foreign currency" [Tr. 33, Ex. A, Art. XIX(g)1; also see Tr. 34 and 35].

Appellant chooses to ignore the language of the contract itself. For example, appellant describes the document as "a simple agreement for the sale of personal property" (App. Br. 11). Elsewhere appellant seems to be suggesting (although he stops short of stating directly) that this contract is not concerned with distribution, for he says: "The acquisition of rights to produce a motion picture, must, we respectfully submit, be carefully distin-

guished from the actual distribution of the motion picture in its produced form" (App. Br. 14).

The statement read in detachment is a platitude, but read in the context in which it is placed in Appellant's Brief, it is specious sophistry. A simple refutation to any argument that the contract does not relate to world-wide distribution will be found in the answer which appellant makes to this query: Would appellant acknowledge that he would have no recourse against appellee, if it, as Purchaser, had refused to distribute the photoplay outside a single state of the United States, or in Canada or elsewhere in the world after it had concluded its purchase of appellant's miscellaneous rights in the property? —bearing in mind that the consideration which the contract provides shall be payable by appellee as Purchaser to the seller (of whom appellant is an assignee) is not a sum certain, but is a portion of the "net profits" realized from world-wide distribution [Tr. 27, Ex. A, Art. XI (e)].

The basic obligations of appellee, the Purchaser, as stated in the words of the contract itself, are to "produce and distribute", and also account, for the earnings of the contemplated photoplay. In the recent case of *U. S. v. Schubert,* 348 U. S. 222, 75 S. Ct. 277, 99 L. Ed. 279 (1955), Chief Justice Warren said:

> "'[T]rade or commerce' has been held to include the production, distribution and exhibition of motion pictures . . ."

The *Schubert* opinion cites some of the many cases which have held that the motion picture industry is intimately involved in interstate commerce. See, *e. g., Binderup v. Pathe Exchange,* 263 U. S. 291, 44 S. Ct. 96, 68 L. Ed.

308 (1923), where the Supreme Court noted the interstate character of the production-distribution phases of the motion picture business, as follows (263 U. S., at p. 309):

> ". . . The business of the distributors, of which the arrangement with the exhibitor here was an instance, was clearly interstate. It consisted of manufacturing the commodity in one state, finding customers for it in other states, making contracts of lease with them, and transporting the commodity leased from the state of manufacture into the states of the lessees."

The instant contract involves, in addition to distribution, the production of motion picture, as its language clearly shows. As indicated in the quotation from the *Binderup* case, *supra,* the production of motion pictures is a specialized form of manufacturing.

The status of manufacturing as interstate commerce was reviewed in detail by the United States Supreme Court in *Mandeville Island Farms v. American Crystal Sugar Co.,* 334 U. S. 219, 68 S. Ct. 996, 92 L. Ed. 1328 (1948). The opinion notes the steady erosion and ultimate elimination of the old concept that production and manufacturing somehow were distinguishable from the commerce which they generated. The modern concept of the law is thus expressed in the *Mandeville* case opinion:

> ". . . The artificial and mechanical separation of 'production' and 'manufacturing' from 'commerce', without regard to their economic continuity, the effects of the former two upon the latter, and the varying methods by which the several processes are organized, related and carried on in different industries or indeed within a single industry, no longer suffices

to put either production or manufacturing and refining processes beyond reach of Congress' authority or of the statute . . ." (334 U. S. at p. 229.)

"* * * * * * * *

"The formulation of the *Shreveport* doctrine was a great turning point in the construction of the commerce clause, comparable in this respect to the landmark of *Cooley v. Port Wardens,* 12 How (U. S.) 299, 13 L. Ed. 996. For, while the latter gave play for state power to work in the field of commerce, the former broke bonds confining Congress' power and made it an effective instrument for fulfilling its purpose. The *Shreveport* doctrine cut Congress loose from the haltering labels of 'production' and 'manufacturing' and gave it rein to reach those processes when they were used to defy its purposes regarding interstate trade and commerce. In doing so the decision substituted judgment as to practical impeding effects upon that commerce for rubrics concerning its boundaries as the basic criterion of effective congressional action." (334 U. S., at pp. 232, 233.)

The argument of appellant that a contract involving not only distribution of motion pictures but also production thereof does not evidence a transaction involving commerce is utterly unrealistic in the light of the developing concepts of commerce as expounded by the Supreme Court of the United States in the many cases described and summarized in the *Mandeville* case. The modern legal doctrine of commerce applicable to industries, such as the motion picture industry, which embrace production, distribution and marketing activities, must not yield to decisions of yesteryear, cited by appellant, which hold that

a grocery store or gas station may not be in interstate commerce.

The two decisions cited by appellant in support of his observation that "Not every transaction concerning the motion picture industry involves interstate commerce" (App. Br. 14, footnote), are readily distinguishable. The court in *Tad Screen Advertising, Inc. v. Oklahoma Tax Commission,* 126 F. 2d 544 (C. A. 10), merely held that a state may tax receipts of an advertiser, who claimed that the commerce clause forbade such tax since his advertising was done on motion picture theatre screens. In the other cases, *Boynton v. Fox West Coast Theatres Corp.,* 60 F. 2d 851 (C. A. 10), the court held that a Kansas law restricting Sunday movies was not invalid under the commerce clause. It is difficult to appreciate the pertinency of such decisions to the issue here presented.

It is important to keep in mind that Section 2, Title 9, U. S. Code, applies to arbitration provisions in contracts evidencing transactions *involving* commerce. The transactions need not be *in* interstate commerce. The transaction must only *involve* such commerce. As was said in *Culver v. Kurn,* 354 Mo. 1158, 1163; 193 S. W. 2d 602, 604 (1946): " 'Involve' imports the idea of 'implicate', 'include', 'affect'." To hold that the large scale production and distribution of the motion picture undertaken under the contract under consideration here does not involve or affect interstate commerce would be a negation of the entire trend of Supreme Court decisions defining the commerce concept. Recent cases dealing with the clause "involving commerce" under 9 U. S. Code, Sec. 2, indicate the trend toward a broad view of commerce. Compare: *In re Cold Metal Process Co.,* 9 Fed. Supp. 992 (W. D.

Pa. 1935)* with *Petition of Prouvost Lefebvre, etc.,* 105 Fed. Supp. 757 (S. D. N. Y. 1952), and *Wilson & Co. v. Fremont Cake & Meal Co., 77* Fed. Supp. 364, 373 (D. Neb. 1948).

## II.

## Even if the Instant Contract Did Not Involve Commerce, It Would Be Valid Under California Law, and California Courts Would Grant a Stay.

Assuming, *arguendo,* that the instant contract does not involve commerce within the purview of the Federal Arbitration Act, nevertheless a stay of proceedings should still be granted by a federal court exercising diversity jurisdiction in accordance with state law, since appellee agrees with appellant that a contract not involving commerce would be construed and treated in accordance with state law under the recent holding of the United States Supreme Court, *Bernhardt v. Polygraphic Co.,* 350 U. S. 198, *supra.* Appellee acknowledges that in such circumstances the issue is whether the contract is valid under state law.

The basic contention of appellant seems to be that the arbitration provisions of the contract are really nothing more than valuation provisions. To demonstrate the worthlessness of this contention, once more we must refer to the contract. Appellant, of course, has at an earlier

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*The opinion in this case is less than satisfactory. Apart from reflecting an antiquated concept of commerce, it cites and relies on *Zip Mfg. Co. v. Pep Mfg. Co.,* 44 F. 2d 184 (D. C. Del. 1930), and *In re Woerner,* 31 F. 2d 283 (C. A. 2, 1929), neither of which involved the commerce issue, directly or indirectly. The former case held that questions as to validity of patents were not arbitrable. In the latter case, a brief opinion by Manton, J., held that the allegations of the complaint failed to show jurisdiction.

point assumed that the agreement was "a simple agreement for the sale of personal property" (App. Br. 11), which it is not. Appellee agreed to produce and distribute a motion picture, based on a novel supplied by appellant, and agreed to share the profits according to a formula, which, among other things, allowed appellee to recover 25% of direct expenses as compensation for studio overhead [Tr. 32]. The complaint alleges that appellee really charged 51.695% [Tr. 8]. Since appellant asserts that he does not challenge appellee's mathematics (App. Br. 19), it must be clear to the court that the controversy must be over the definition of the direct charges on which the 25% is charged, which is in fact the issue. If appellee has correctly classified as direct charges the items on which the 25% was charged, it wins. If it did not, appellant wins. The arbitration clause, designed to settle any controversy over the classification of expenses, could not be more in point. But, appellant says the arbitration provisions are for a "valuation", although it is quite unclear just what he thinks is being valued. Of the cases cited by appellant, *Rives-Strong Bldg., Inc. v. Bank of America,* 50 Cal. App. 2d 810 (1942), is typical. There a landlord and tenant made a lease with no fixed rental provision beyond the first 4½ years, with provision for establishment of a fair rent by three "arbitrators." The arbitrators made a determination, the landlord refused to accept it and brought suit for fair value of the premises, contending that the action of the three arbitrators did not conform to the procedural requirements of the California Arbitration Act. The court held that the determination was not an arbitration for the purposes of applying the procedural requirements of the California Arbitration Act. The court

pointed out that the arbitration statute in California as it existed at that time provided for arbitration only of controversies "which might be the subject of a civil action" between the parties. The court said (p. 814):

> "As the determination of values or other calculations involved in voluntary contracts between individuals, and therein for convenience left to third persons, could not be the subject of a civil action, it seems clear that the statute was not intended to apply to this type of agreement."

To the same effect on similar facts is *Thompson v. Newman,* 36 Cal. App. 248 (1948). That the absence of a subject which could be the basis of a civil action was the rationale of decision in *Rives-Strong* and similar cases is made clear in *Cathcart v. Security Title etc. Co.,* 66 Cal. App. 2d 469 (1944).

The other cases cited by appellant are not dissimilar. In *M. E. Church v. Seitz,* 74 Cal. 287 (1887), the question to be referred to the arbitrators was the fair value of fixtures which a lessee had an option to require the lessor to purchase at a price fixed by the arbitrators. The contention in that case was that the common law procedural requirements for arbitrators had not been met. The court said that the proceeding in question was not akin to an arbitration because there was no dispute of the type which is usually resolved in a proceeding "analogous to an investigation by a Court."

The basis of decision in those cases was that the agency selected was strictly a "fact-finding" agency and was not authorized to pursue matters to the extent of resolving a dispute by making an enforceable award. The proceeding in the present case is obviously intended to deal

with a matter on which, absent an agreement, a civil action could be filed (and, may we observe, has been filed) to tender issues which appellant chooses in this court to characterize as mere "valuation" questions.

Each case appellant cites for the proposition that a third party was not an arbitrator, but an appraiser, arose in substantially the same manner. A person who had agreed to be bound by the decision of a third party became dissatisfied with the third party's decision, and sought to avoid his agreement on the ground that the procedural requisites of a formal arbitration were not met. In each case, the dissatisfied one was held to his bargain, the court finding that the procedural requisites of a formal arbitration are unnecessary. In such cases there is manifest a judicial disposition to disallow the objections of a dissatisfied party, who refused to live up to his agreement after the third party had made his decision. Even if such cases might be said to have some tenuous relevancy to the problem, they should be critically applied here, where appellant obviously places reliance upon them to escape rather than to implement his contractual commitment to resort to arbitration.

Apart from an insubstantial claim that the controversy disclosed by the complaint is one over "value" of something, appellant makes two other contentions. One is that because the arbitration clause provides for presentation of the dispute to the arbitrators in writing and not orally and also provides that the arbitrators may "secure advice and information independently" that the agreement does not properly provide for arbitration. Appellant gratuitously concludes that "This is not arbitration under the law of California." (App. Br. 19.) This position is not supported by authority (authorities *contra* are collected in

the U. S. Supreme Court's opinion in *Bernhardt v. Polygraphic Co.,* 350 U. S. 198, at footnote 4). That it is proper for an arbitrator to seek independent information and advice was recently reiterated by the California Supreme Court in *Griffith Co. v. San Diego College for Women,* 45 Cal. 2d ...., 289 P. 2d 476 (1955), where, at page 479 the court quotes approvingly its earlier opinion in *Sapp v. Barenfield,* 34 Cal. 2d 515, 521, 212 P. 2d 233, 238:

> "This procedure may be *ex parte,* without notice or hearing to the parties, for 'it is entirely proper for arbitrators, in a case requiring it, to obtain from disinterested persons of acknowledged skill such information and advice in reference to technical questions submitted to them, as may be necessary to enable them to come to correct conclusions, provided that the award is the result of their own judgment after obtaining such information.'" (Citing 1 Mechem, Agency §310, p. 229, and numerous cases.)

The arbitration clause provides for an exchange of views in writing, with a copy of each writing sent to the adversary. This surely provides an adequate hearing.

The arguments of appellant are without substance. The questions presented for arbitration in this proceeding clearly are not valuation matters, as appellant assumes without citing supporting judicial authority. There is nothing to be evaluated here. The question is, as may be seen from the Complaint, whether defendant has properly allocated costs and charges in its accounting for the profits of the subject motion picture. This suit would be stayed by a California Court (Cal. Code Civ. Proc., Sec. 1280, *et seq.*), and the stay granted in the District Court would therefore be proper, even if the contract were not one evidencing a transaction involving commerce.

## III.

**Whether the Contract Is Construed as One Evidencing Transactions Involving Commerce, or as One Enforceable Under State Law, the Issues Tendered in the Complaint Are Referable to Arbitration.**

The controversy between appellant and appellee manifestly involves accounting matters, chiefly whether the proper system of classifying direct expense was used by appellee, and whether certain expenses which relate to the CinemaScope process were chargeable to the photoplay "The Robe." As already pointed out, the complaint alleges that appellee charged 51.695% of direct expenses as overhead [Tr. 8, 9]; significantly the allegations of the complaint are not capable of being construed as charging the gravamen of injury to be that appellee's accountants have failed to multiply the sum of the direct expenses by percentage factor of 0.25. Rather, the issue as pleaded is whether the direct charges were properly designated as such. Also, the complaint alleges that CinemaScope expenses were charged to "The Robe." The arbitration provisions of the contract are designed to provide for arbitration of any dispute as to the cost of producing the negative [Tr. 35-37], or "as to any accounting" [Tr. 38]. In both cases the arbitrators are to be "certified public accountants" [see Tr. 37, 38].

Appellant characterizes the complaint as presenting "serious and weighty issues of law" (App. Br. 24), but it is difficult to glean from the document just what these are. Depending upon one's construction of the complaint, it either charges appellee with faulty mathematics or with faulty accounting; wherein the determination of either fact presents a "serious and weighty issue of

law" that the parties could not possibly have intended to allow accountants to decide remains unexplained and unsupported. True, a breach of the accounting standards expressed or implied in the contract would be a breach of contract, but the only two questions presented by the complaint are a determination of appellee's obligations under the contract and whether or not appellee has performed those obligations. Even if questions of law were involved, the matter would be no less arbitrable. In *Pacific Indemnity Co. v. Insurance Co. of North America,* 25 F. 2d 930 (C. A. 9, 1928), this court said (p. 932):

> "It is next contended that the state arbitration law does not govern disputes as to the legal construction or wording of contracts, but only disputes as to questions of fact arising out of them. Section 1281 of the Code of Civil Procedure, as amended (St. Cal. 1927, p. 404, §2), provides:
>
> " 'Two or more persons may submit in writing to arbitration any controversy existing between them at the time of the agreement to submit, which arises out of a contract or the refusal to perform the whole or any part thereof or the violation of any other obligation.'
>
> "This section is broad enough to authorize the submission of any and all questions arising under a contract, whether such questions relate to the construction of the contract or to questions of law or fact arising thereunder."

Perhaps the basic fallacy of appellant's argument on this point is his failure to distinguish between accounting and bookkeeping. A fair analysis of the complaint makes it clear that the issue presented is whether or not in a number of different instances, defendant (appellee) has

properly *classified* various expenditures as direct expense chargeable to "The Robe." The American Institute of Accountants has promulgated a definition of accounting for observance in treating A. I. A. documents. This definition reads as follows:

> "Accounting is the art of recording, *classifying* and summarizing in a significant manner and in terms of money, transactions and events which are, in part at least, of a financial character, and the results thereof." (A. I. A. Accounting Research Bulletin No. 5, Oct. 1940.) (Emphasis added.)

Appellant apparently would omit the concept "classify" from any definition and synonymize accountants and accountancy, respectively, with bookeepers and their routine functions of assembling and tabulating invoices and vouchers and verifying arithmetical sums. Accounting commonly requires consideration, analysis and resolution of business practices and conduct having fiscal aspects or consequences; for example, whether certain costs are reasonable and proper charges against one account or another or neither, and whether the costs as recognized contribute to the acquisition of the income to which they are charged; and whether a net profit or loss is recognizable. A mere bookkeeper does not customarily treat or resolve matters of such magnitude. Since Appellant's Brief concedes (App. Br. 19, 24) that sound accounting principles were used in preparation of the statements reporting appellant's participation in the proceeds of the subject photoplay, the conclusion seems inescapable that there really is no complaint he may justly make if the concession made in his brief is literally accepted. Thus, it seems apparent that appellant either is confusing the concepts of accounting and bookkeeping or that in effect he is asking

this court to ignore commonplace business customs and traditions, and to make arbitrary innovations. We trust that the court will not be so tempted.

The language of the contract itself justifies the inference that the parties foresaw the possibility that accounting controversies might arise. Therefore, it is quite understandable that they should make provision in their contractual documents that such questions be determined by a class of arbitrators familiar with the subject, namely, accountants of recognized standing.

Since the issues disclosed by the complaint are referable to arbitration, the grant of the stay by the District Court was proper.

## IV.

## Appellee Is Not in Default in Proceeding With Arbitration.

Appellant contends (App. Br. 25-26) that appellee is in default in proceeding with arbitration, yet no basis for such a claim is indicated and no supporting authority is cited. In his brief (App. Br. 25) appellant seems content to rely on the affidavit of his counsel, Stuart L. Kadison [Tr. 57] that there has been a default, but the reference to the affidavit is followed immediately by a patently contradictory statement (App. Br. 26), that the affidavit relates to matters not involved in this suit. Despite the confusing effects which such Machiavellian-type argument produces, the fact remains that there is nothing in the affidavit of Stuart L. Kadison which indicates that appellant ever asked for arbitration of the controversies described in the complaint, or that appellee failed to cooperate in that regard. Since it is appellant who charges that appellee has committed wrongful acts, it is the re-

sponsibility of appellant to request arbitration of these matters, for appellee has no duty to demand arbitration of alleged controversies when it is perfectly satisfied with its performance under the contract. Thus, appellant's claim that appellee is in default in proceeding to arbitrate questions on which appellant has never requested arbitration is a contention which fails because of its own infirmity.

The letter of Stuart L. Kadison, attached as Exhibit A to the affidavit of Stuart L. Kadison [Tr. 59], in addition to demanding arbitration of specific controversies not here involved, makes a general statement that there are "other matters" on which arbitration should be had [Tr. 60]. Even if this omnibus phrase is construed as a demand for arbitration of the issues raised by this complaint, the claim that appellee is in default is patently groundless, since this suit was filed *one day* after the letter demanding arbitration was dispatched. In support of his claim that a delay of one day is sufficient to place appellee in default in proceeding with arbitration, appellant cites two cases.

One of these (*American Locomotive Co. v. Chemical Research Corp.,* 171 F. 2d 115), holds that a delay of *more than seven years* after filing an answer to a complaint effectively barred the defendant from asserting that the matters set out in the complaint should be arbitrated. The second case (*Radiator Specialities Co. v. Cannon Mills,* 97 F. 2d 318), holds that a delay of *nine months* after filing of the answer placed the defendant in default with proceeding with arbitration, particularly when the motion to stay pending arbitration was made on the date the trial of the action was to begin. Apparently appellant contends that these cases are authority for the proposition that the lapse of *one day* placed appellee in default in

proceeding with arbitration. Actually there was no recognizable delay in dealing with appellant's request. The affidavit of appellee's Resident Counsel, Frank H. Ferguson [Tr. 62] discloses that appellant's demand was promptly forwarded to those persons in appellee company who had the information relating to the alleged controversy, and that before they could act or reasonably be expected to act, this suit was filed. In short, appellant's argument respecting default is untenable in fact and in law.

## Conclusion.

Appellee respectfully submits that the stay granted by the court below was clearly authorized because the issue was arbitrable under the agreement and appellee was not in default in proceeding with arbitration. Accordingly, the order of the trial court should be affirmed, provided, of course, the court does not dismiss the appeal for want of an appealable order.

Respectfully submitted,

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